IN THE
SUPREME COURT OF MISSOURI

RICHARD D. DAVIS,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC94622**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 16
THE HONORABLE MARCO A. ROLDAN, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTION AND STATEMENT OF FACTS

Appellant, Richard Davis, incorporates herein by reference the Jurisdictional Statement and Statement of Facts from his opening brief.

ARGUMENT

I. Failure to call Dr. Reynolds.

The motion court was not absolutely free to substitute its own "expert" scientific opinion as to an expert's testimony for the jury's.

The State argues that the motion court was free to reject Dr.Reynolds's testimony, and that this was not substituting itself for the jury, but rather deciding that Dr.Reynolds's lack of credibility was fatal to the deficient-performance prong of the claim.(Resp.Br.31-32). It says it "cannot be the law" that the mere allegation suffices as proof. (Resp.Br. 32).

But this mixes the two issues. This is not a situation where two lay witnesses gave opposing testimony and the court was required to believe only one. Dr.Reynolds, a clinical psychologist who specializes in trauma(Hr.Tr.218), was not saying the light was red when another witness said it was green. The motion court not only substituted its judgment for the jury's, it placed itself as the sole judge of a professional, scientific field, finding Dr.Reynolds not credible because she relied on what Rick told her—which she specifically said she was experienced enough to see through dishonesty(Hr.Tr.234)—she was paid, and she opposed the death penalty (PCR.L.F.1423-24). That is what "cannot be the law." The prosecutor's own biases in the case and extreme personal dislike of Rick and anyone who sided with him came through the transcripts of trial, depositions, and the evidentiary hearing, as well as the motion court's findings that show his influence.

This Court has not said that the motion court solely decides that a scientific expert witness may not be heard by the jury because the court did not believe his or her testimony.

In ***State v. Kenley***, 952 S.W.2d 250, 261 (Mo. banc 1997), this Court considered the issue where the motion court rejected an expert's testimony, but in that case, the doctor's opinion about a brain injury was contrary to the opinions of three other doctors, the doctor "could not state with certainty that [Kenley] was impaired [at the time of the crime] . . .[and he] could not attribute [Kenley's] criminal behavior to the impairment he suffers." Further his opinions were contrary to the evidence, and his "assessment of Kenley offered little insight into Kenley's mental state on the night of the crimes." *Id*. at 261-62. That is not a blanket rule allowing the complete rejection of an unopposed expert's opinion.

Importantly, Dr.Reynolds's testimony was proposed on penalty, not guilt. See ***Tennard v. Dretke***,542U.S.274,285(2004)("Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."). Counsel chose not to hire an expert in sexual and physical trauma, though he did not think Rick would have refused to see anyone(Hr.Tr.1149-50). This evidence was not "cumulative" because counsel did not present evidence of trauma; they did not give the jury a reason for Rick's behavior, a reason to give him life. Dr.Reynolds supplied that reason, a reason counsel failed to investigate. See ***Kenley v.Armontrout***,937F.2d 1298,1304(8th Cir.1991).

For these reasons and those in his opening brief, counsels' failure to call Dr.Reynolds to testify about that trauma denied Rick effective assistance of counsel and a new penalty phase is required.

II. Dr.Logan and Bipolar Disorder (Replies to Respondent's Points II and III).

The State's argument fails because it is built on a series of misstatements of the facts underlying Dr.Logan's testimony and the timing of his learning of evidence he was not given before trial.

The essence of the State's argument is, again, that the motion court was free to ignore a board-certified forensic psychiatrist because it found him, and his expert diagnosis, not credible.(Resp.Br.69-70, 87). Rick incorporates his reply to Point I.

But beyond that, the State's recitation of the evidence in support of its argument has serious factual errors and it should be rejected by this Court. And to the extent those errors informed the motion court's findings, they are clearly erroneous.

The State first misstates that counsel made the crime videos available to Dr.Logan, who never watched them.(Resp.Br.54). Dr.Logan actually said that the tape he got could have been the tape of the "walk-through," when Rick was taken out into the field; he said he never got the videos of sex acts(Hr.Tr.648-49). The State next says that "Dr.Logan admitted that post-conviction counsel had contacted him during the preparation of the case because his statements to post-conviction counsel about the new information he had learned had only come from his new interviews with [Rick.]" Actually, mitigation specialist Kathy Anderson-Foster emailed him wanting to know what information he did not have earlier in the case, which was important to be able to show that insufficient information had been provided before trial; Dr.Logan did not say the new information came only from interviews with Rick(Hr.Tr.687).

The more important errors are in what the State claims Dr.Logan knew before trial, that it was essentially the same as what he learned afterward, and that his memory was untrustworthy.(Resp.Br.56-57). It says Dr.Logan learned of or personally observed many of the allegedly "new" symptoms Rick provided to him. (Resp.Br. 56-57). Dr.Logan testified that when he met with Rick in March 2007, that Rick had a "rush" like he was on speed the previous night, and that he observed depression; anxiety; irritability; decreased sleep; suicidal thoughts; suspiciousness progressing to paranoia or perhaps delusional proportions; racing thoughts; and rambling, disorganized speech (Hr.Tr.703). But in the letter Dr.Logan was not provided by trial counsel, Rick noted the following changes in his behavior:

1. Started smoking cigarettes.
2. Started chewing [tobacco].
3. Stopped working out at work.
4. Stopped working out at home.
5. Stopped writing his sister 3-4 times/week
6. Stopped drinking non-sugar, non-caffeine drinks.
7. Closed his P.O.Box he used for his business.
8. Stopped going to his motorcycle shop other than once every 2-3 weeks.
9. Started wasting money.
10. Started buying drugs for Riley.
11. Stealing
12. Could not sleep.

13. Hearing sirens and other unreal sounds.

14. Sexual increase, 4-6 times an already-high level.

15. Questioning himself as to what he was doing.

16. Threatening people; looking for trouble.

17. Suicidal thinking.

18. Stopped going to lunch with Lloyd, Pat and Jeff.

19. Stopped talking to others, or talking too much.

20. Smashing things at home.

21. Dangerous behavior at work.

22. Refusing needed medical help.

23. Poor hygiene and housecleaning.

24. 15-20 pound weight loss.

25. Stopped weekly fishing trips.

26. Questioned why things happened to him; thought movie Natural Born Killers was about them.

27. Started having Dena take pills, thinking it was helping her.

28. Stopped wearing a watch; time was too slow.

29. Had to write things in a notebook to remember them.

30. Could only think small thoughts.

31. Fell at work.

32. Socializing with people he would not have before.

33. Felt he was in a dream; could not think ahead.

34. Heard he was fighting with his sister; did not remember.

35. No longer keeping his word.

36. Not finishing things.

37. Crying at times at work and home; felt like tearing himself apart.

38. Could only take Ativan and Klonopin , which helped, at work; feared their wearing off. Bought Riley pills to calm her down.

39. Failed to get business taken care of.

40. Believed they were going to die but did not fear it; thoughts of reincarnation.

41. One day seeing things as if in the 1970s.

42. Confused at work.

43. Thought Riley and Sherri were putting methamphetamine in his food.

44. Felt at times like he had electricity in his brain and body.

45. For a time between medications, could not believe what had happened; afraid of himself and of hurting Riley and others; numb; tried to cure himself through exercise but with no effect; felt he was different people.

46. Stalked a person one night for no reason, but wanted to hurt him.

47. Doing everything he had quit doing 20 years earlier.

48. The deaths of himself and others were unimportant.

49. Began watching sex videos with rough sex and pain; had not before.

50. Wondered who he was.

51. Hit a trash can with car; did not care about damage.

52. Wrote bad ways to die in his notebook.

53. Believed their lives would be like a script.

54. Followed through with anything he thought, without being able to stop.

55. Losing hours.

56. Stopped praying, though he had every night for 15 years.

57. No emotion; did not feel.

58. Even pain was numb.

59. Obsessed over Riley.

60. Even thought of doing things like the terrorists on 9/11.

61. Quit doing what he had done before, or made it through somehow.

62. Felt like he was on speed and bad LSD but did not use illegal drugs.

63. Did not think as he used to – in shock, terrified, numb, hurting.

64. Had sex for 7-10-12-14 hours with few breaks; much longer than ever before.

65. Scared of sex between medications.

66. Kept asking why things were as he remembered, and had no answer.

67. Sometimes told to shut up at work.

68. Just remembered it felt like they were making a movie about their lives that would open the world's eyes.

69. Speeding and not using a seatbelt, not fearing a crash.

70. Fearing his medication would wear off at work; panicking; leaving work; focused on control through sex.

71. Had to get up and leave at times in late evening or early morning.

72. Wondered who he was at times.

73. Memories would take over and he could not shake them.

74. Forgot to do basic things such as showering, brushing his teeth, and that he did not smoke or chew.

75. Believed there was a demon at times; this was even before taking medications.

76. Was very forward with women at times.

77. Some people in his life asked what was wrong; could not remember whether there were others.

78. Could not control himself as before.

79. At some point he gave up; it was like a game his good and bad sides were playing.

(M.Ex.29;Resp.Ex.216,pp.5-14).

Although some of this information obviously was not new, this detail is not in Dr.Logan's notes or testimony concerning what he knew before trial. And it was this detail that led Dr.Logan to diagnose Bipolar I Disorder. There is nothing in the record to even suggest that he had much the same information as was not available to him when counsel failed to turn over the letter. Whether this detail meant anything to the prosecutor is not the issue; rather it is whether it meant something to a licensed professional.

The State has also twisted the story of the meeting between Dr.Logan, trial counsel Elliott, and mitigation specialist Muller: It says that Dr.Logan "conceded" that his direct testimony that he remembered meeting with Susan Elliott was "inaccurate"(Resp.Br.56,citing Hr.Tr. 756). But again, Dr.Logan said he recalled

Elliott and Muller coming to his office to discuss his role in the defense(Hr.Tr.541). After several objections, he said that "[m]edication was discussed at that point" (Hr.Tr.542), But at what point is not clear after the objections, because he also later responded that he discussed the SSRI issue with "the trial attorneys" because "they" were considering an SSRI defense, and he told them he did not think it was viable(Hr.Tr.546). He later clarified that he recalled the meeting, but he could not say who was there, and that if he said Ms.Elliot, that inaccurate(Hr.Tr.754-56).

The State next claims that by one-to-three days after Ms.Spicer's murder, Dr.Hachinsky's notes "no longer included a possible bipolar diagnosis" (Resp.Br.56). But Dr.Logan's testimony was that it simply was not mentioned (Hr.Tr.770-71); in fact Dr.Hachinsky's meeting notes simply repeat Rick's previous diagnoses—which said Bipolar I Disorder was to be "rule[d] out"(Resp.Ex.261).

The State claims that Rick's statement to DOC personnel in July 2011 that he had been diagnosed with Bipolar I Disorder was untrue (Resp.Br. 57), but the implication that Rick lied was unfounded; Dr.Hachinsky had mentioned the possible diagnosis in his original findings(Resp.Ex.261), and by February 2011—before Rick's statement to DOC—Dr.Logan himself had made that diagnosis (Hr.Tr.801). And the prosecutor noted that the DOC records indicated that Dr. Stanislaus made a diagnosis of bipolar disorder in August 2011(Hr.Tr.802).

A statement that is not false but must be carefully noted is the State's assertion that Dr.Logan "conceded" that Rick was not suffering from diminished capacity at the

time he murdered Ms.Ricci. (Resp.Br.58). That may be true, but it is not relevant here.

The core of the State's argument that Dr.Logan must have known the basics of what was in the 8/24/07 letter, is its assertion that Elliott told Dr.Logan those details in their meeting about the SSRI defense, and may well have shown him the letter(Resp.Br. 58-59, 87-88). But Elliott's testimony is contrary to the assertion. First, she could not say whether she had even seen the letter; she had no memory of it (Hr.Tr.196). She said the notebook that Dr.Logan might have seen had no real notes about Rick's behaviors, no personal information (Hr.Tr.191). Further, Dr.Logan told her he did not need any details, because the SSRI defense—something that is not at issue in this case—was not viable (Hr.Tr.197-98). Nor did Muller testify, as the State claims, that she and Elliott gave Dr.Logan a "document" that appeared to be the same as the letter.(Resp.Br.66). She said only that it was a "document," and gave no description (Hr.Tr.896-97).

Therefore, the claim that the motion court was entitled to disbelieve Dr.Logan's testimony that he did not receive the letter before trial(Resp.Br.66), is unsupported by any actual evidence. Both Elliott and Dr.Logan testified that Dr.Logan quickly disposed of the SSRI defense(Hr.Tr.195,546-47). And the State's argument ignores that Elliott was not there to discuss switching or bipolar disorder; that was not the point of her SSRI research but rather she was looking at research Rick got her started doing into the direct effects of SSRI drugs(Hr.Tr.187,192).

The claim that Rick "clearly spoke to Dr. Logan about his alleged changes in behavior as appellant refused to speak to Dr. Logan unless Dr. Logan spoke to him about the proposed SSRI defense"(Resp.Br.68), is another misstatement. The State cites Muller's testimony for that assertion, but she said that Rick met with Dr.Logan for a long time before later deciding not to talk to him if he would not discuss the SSRI defense(Hr.Tr. 877). She did not mention anything about his wanting to discuss changes in behavior.

The State's argument that "By hiring Dr. Mandracchia and receiving findings about each [mental health] issue[], counsel satisfied his obligation to investigate all of the alleged mental health defenses alleged by [Rick]"(Resp.Br.72), is inconsistent with ***Rompilla v. Beard***,545 U.S.374,391(2005)(even though counsel retained three mental health professionals they failed to present mental health evidence that included test scores showing a third grade achievement level after nine years of schooling). So presenting one, but an insufficient, expert, does *not* satisfy counsel's obligation.

Finally, the State's argument that Rick did not show prejudice, because the "overwhelming" evidence of guilt would negate any attempt to raise a mental defense(Resp.Br.76), ignores the fact that the subject is evidence that the jury did *not* hear, and it thus ignores the rule of ***State v. Jackson***,433 S.W.3d 390,399(Mo.banc 2014), that, "the jury's right to disbelieve all or any part of the evidence and its right to refuse to draw needed inferences is a sufficient basis in the evidence—by itself—for a jury to conclude that the state has failed to prove the differential element." It is for a jury to decide whether to credit Dr.Logan's testimony.

Specifically as to the State's Point III (Rick's Point VI), the State's claim that "Dr.Logan's testimony did not present a viable 'involuntary intoxication' defense because Dr.Logan's testimony established that [Rick] was not under the influence of any drug at the time of the crimes and thus was not involuntarily intoxicated" (Resp.Br.88-89), similarly misstates the evidence. First, the question was addressed specifically to Dr.Logan's *pretrial deposition testimony*(Hr.Tr.771). He made it clear that he was referring to "side effects" from the drugs (Hr.Tr.772). And he testified that the phenomenon of switching was not a direct effect of SSRI drugs; it was more that the drugs unmasked an underlying condition (Hr.Tr. 720). That testimony would have provided a real, not an imaginary, defense.

One final note as to the State's Point II. It states that Rick did not carry through that part of his Point Relied On that raised diminished capacity in his Point VI (Resp.Br.79,n.3). That issue was addressed in the closing "alternative" portion of his argument—that the issue of involuntary intoxication should at least have been presented to the jury in penalty phase in mitigation. (App.Br.110-11).

For these reasons and those in his opening brief, counsels' failure to call Dr.Logan to testify about Rick's Bipolar I Disorder diagnosis, his competence to stand trial, diminished capacity, and the defenses of mental disease or defect and voluntary intoxication due to his mental disease and his medications, and to present such evidence in penalty phase denied Rick effective assistance of counsel and a new trial or penalty phase is required, as requested in Points II-VI in his opening brief.

III. Failure to call Rick and prepare for his testimony in guilt and penalty phases (Replies to State's Point IV)

Rick's 8/24/07 letter to trial counsel constituted his proposed guilt phase testimony.

The State is mistaken that Rick did not present evidence of what he would have testified to in guilt phase had counsel not refused to call him despite his wish to testify (Resp.Br.95). Rick did present such evidence: he specifically pled that he wished to testify to the contents of the 8/24/07 letter(PCR.L.F.302,337-38). That letter was in evidence as M.Ex.29, also as Resp.Ex.216, and it was included in the supplemental legal file on direct appeal (Supp.L.F.28-44). So his "testimony" is in evidence, not simply an allegation, so it was before the motion court, and it is before this Court. It is summarized, *supra*, in Point II.

For these reasons, and those presented in his opening brief, Rick asks this Court to remand for a new trial (Point VII), or in the alternative a new penalty phase (Point VIII).

CONCLUSION

For the reasons stated herein and in Points I, IV, and VIII of his opening brief, Rick asks this Court to reverse his conviction and remand for a new penalty phase. For the reasons stated herein and in Point II of his opening brief, Rick asks the Court to vacate his sentence and remand for a new trial at such time as he is determined to be competent. For the reasons stated herein and in Points III, V, VI, and VII of his opening brief, Rick asks the Court to remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,262 words, which does not exceed the 7,750 words allowed for a reply brief.

On the 14th day of October, 2015, the foregoing reply brief was filed through the E-file system for delivery to Richard A. Starnes, Assistant Attorney General. The electronic file has been scanned for viruses using Symantec Endpoint Protection, updated in October, 2015, and according to that program, the file is virus-free.

/s/ *Kent Denzel*
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